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In The

Supreme Court of the United States

October Term, 1980

No. _____

TELTRONICS SERVICES, INC.,

Petitioner,

–against–

L.M. ERICSSON TELECOMMUNICATIONS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
and
MOTION FOR EXPEDITED CONSIDERATION

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Respondent.

MOTION FOR EXPEDITED CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jules J. Hessen (the "Trustee"), as Trustee in Bankruptcy of the Petitioner, Teltronics Services, Inc. ("Teltronics"), by the undersigned attorneys, asks this Court for expedited consideration of the within petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Such expedited consideration is requested to allow this Court, if the writ is granted, to consider this case as a companion case to Federated Department Stores, Inc. v. Moitie (No. 79-1517).

The argument of the Moitie case has been tentatively scheduled by this Court for the week commencing March 23, 1981. A writ of certiorari was granted by this Court on November 17, 1980 (101 S.Ct. 526; 66 L.Ed. 2d 288).

The decision of the Second Circuit in this case was not handed down until February 17, 1981.

We believe that the issue to be considered by this Court in Moitie is the same as is presented by this case.

Unless expedited consideration of the within petition is granted, it will not be possible for this Court to hear the present case at the same time as Moitie.

In order to enable this Court to consider both cases at the same time and to resolve an apparent conflict among the circuits on the issue involved, we request:

(a) that this Court direct the respondent, L.M. Ericsson Telecommunications, Inc. ("Ericsson"), to file its brief in opposition by March 16, 1981;

(b) that if this Court shall grant the within petition, it do so in sufficient time to permit argument of this case together with the argument in Moitie;

(c) that if the within petition is granted, it be accepted by this Court in lieu of a brief on the merits for the Trustee;

(d) that Ericsson's brief in opposition to the within petition be accepted by this Court in lieu of a

brief on the merits for Ericsson; and

(e) that the case be heard on the appendix used in the court below.

If it will facilitate an expedited hearing of the case, the Trustee will not submit a reply to Ericsson's brief in opposition.

WHEREFORE, Petitioner prays that this Court grant his motion for expedited consideration of the within petition and if such petition is granted, that the hearing of the instant case be scheduled at the same time as No. 79-1517.

Respectfully submitted,

Gabriel B. Schwartz

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Respondent.

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Question Presented for Review

When, in a private antitrust action, strict application of res judicata principles might lend the courts' aid to conduct in violation of the antitrust laws, is the doctrine of res judicata overridden by considerations of public policy?

The question arises in the context of an action by Teltronics Services, Inc. ("Teltronics") to recover treble damages from L.M. Ericsson Telecommunications, Inc. ("Ericsson") for alleged per se violations of Section 1 of the Sherman Act. There has never been a hearing on the merits of Teltronics' allegations. Its earlier complaint alleging violations of the "Federal rules and regulations concerning trade and commerce" was dismissed for failure to state a claim (A4).* Its second complaint, although sufficiently alleging a claim for relief under the antitrust laws, was then dismissed on grounds of res judicata under the provisions of Fed.R.Civ.P.41(b), because Teltronics had failed to appeal or seek timely relief from the dismissal of its initial complaint (A7). The Second Cir-

* References prefixed "A" are to the Appendix.

cuit in affirming dismissal of the second complaint rejected equitable and public policy grounds which were urged as a basis for relief from res judicata principles (A10-14).

Jules J. Hessen (the "Trustee") as Trustee in Bankruptcy of Teltronics, asks this Court to review the judgment of the Second Circuit as a companion case to No. 79-1517 (Federated Department Stores, Inc. v. Moitie) which is tentatively scheduled for argument during the week commencing March 23, 1981.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	5
OPINIONS BELOW	7
JURSIDICTION	8
STATUTES AND RULES OF PROCEDURE INVOLVED	8
STATEMENT OF THE CASE	9
The Parties and Their Relationship	10

Page

The Allegations of the Second Complaint 12

The Earlier Complaint 15

Judge Lasker's First Decision 23

Judge Lasker's Decision on Reargument 25

The Argument of the Appeal ..26

REASONS FOR GRANTING THE WRIT 28

The Writ Should be Granted Because This Court has Already Decided to Review the Same Question in Federated Department Stores, Inc. v. Moitie (No. 79-1517) 28

The Decision of the Second Circuit is in Conflict with a Prior Decision of This Court 31

The Case Should be Reviewed Because the District Court's Original Decision, Although Consistent with Overriding Public Policy, was Rejected by the Second Circuit 32

CONCLUSION 42

Page

APPENDIX A1

Judgment of the United States Court of Appeals for the Second Circuit Entered February 17, 1981 ...A1

Teltronics Services, Inc. v. L.M. Ericsson Telecommunications, Inc., F.2d (2d Cir. 1981) A2

Teltronics Services, Inc. v. L.M. Ericsson Telecommunications, Inc., 491 F. Supp. 538 (S.D.N.Y. 1980) ...A15

Teltronics Services, Inc. v. L.M. Ericsson Telecommunications, Inc., 486 F. Supp. 836 (S.D.N.Y. 1980) ...A17

TABLE OF AUTHORITIES

Page

Bryant v. Carleson, 444 F. 2d 353 (9th Cir. 1971), cert. den. 404 U.S. 967 (1971) 28

Copy-Data Systems, Inc. v. Toshiba America, Inc., 1979-1 Trade Cases 62,696 (S.D.N.Y.) 22

Desrosiers v. American Cyanamid Co., 377 F.2d 864 (2d Cir. 1967) 36

Page

Heiser v. Woodruff, 327 U.S. 726 (1946) 35

Kalimian v. Liberty Mutual Fire Insurance Co., 300 F.2d 547 (2d Cir. 1962) 27

Kreager v. General Electric Co., 497 F.2d 468 (2d Cir. 1974), cert. den. 419 U.S. 861 (1974) 40

Landy v. Federal Deposit Insurance Corp., 486 F.2d 139 (3d Cir. 1973), cert. den. 416 U.S. 960 (1974) 27

La Societe Anonyme des Parfums le Galion v. Jean Patou, Inc., 495 F.2d 1265 (2d Cir. 1974) 36

Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955) 32

Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), rev'd. on other grounds, 425 U.S. 682 (1976) 35

Mercoid Corp. v. Mid-Continent Invest. Co., 320 U.S. 661, (1944) 31

Moch v. East Baton Rouge Parish School Board, 548 F.2d 594 (5th Cir. 1977), cert. den. 434 U.S. 859 (1977) 36; 37; 38

Page

Moitie v. Federated Department Stores, Inc., 611 F.2d 1267 (9th Cir. 1980) cert. gtd., 101 S.Ct. 526, 66 L.Ed. 2d 288 .....26; 29

Ornstein v. Regan, 574 F.2d 115 (2d Cir. 1978) 36

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 39

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 21

Robertson v. National Basketball Asso., 622 F. 2d 34 (2d Cir. 1980) 40

Opinions Below

The opinion of the court of appeals was handed down on February 17, 1981 and has not yet been reported (A2-14). Two opinions of the United States District Court for the Southern District of New York are reported at 486 F.Supp. 836 and 491 F. Supp. 538 respectively. Copies of each of these opinions are reproduced in the Appendix (A15-19).

Jurisdiction

The judgment of the court of appeals was entered on February 17, 1981. Jurisdiction to review the judgment of the court of appeals by writ of certiorari is conferred on this Court by 28 U.S.C. §1254(1).

Statutes and Rule of Procedure Involved

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the

> costs of suit including reasonable attorney's fees."

Rule 41(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule, other than a dismissal for lack of jurisdiction, for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

Statement of the Case

The exposition of the facts as set forth in the two opinions by the district court and in the opinion of the court of appeals is restricted to those which were conceded below by Ericsson and those which were otherwise established of record. Since there has never been a determination on the merits of additional factual allegations contained in Teltronics' second complaint, some reference to those allega-

tions is necessary for an understanding of the grounds upon which Teltronics (and later the Trustee) sought equitable relief from res judicata.

The Parties and Their Relationship

Ericsson is the sole United States marketing representative of its Swedish parent, Telefonaktiebolaget L.M. Ericsson ("LME"), a major manufacturer of telephone equipment (A3). Prior to March 5, 1979 Teltronics was an independent distributor of telephone interconnect equipment manufactured by LME which it purchased from Ericsson (A3). Teltronics' primary business was the leasing of such equipment to users, in competition with the Bell System, and also in competition with Ericsson's subsidiary, L.M. Ericsson Telecomm, Inc. ("Ericsson New England") (JA12-14).*

*JA references are to pages of the Joint Appendix on appeal to the United States Court of Appeals for the Second Circuit.

Teltronics, a publicly owned corporation, obtained its cash requirements through term loans, aggregating more than $8-million from two banks designated by Ericsson (JA20-21; 27). One of such banks was Nordic American Banking Corporation ("Nordic") (A3), which was an affiliate of LME, and the other was Citibank, N.A. ("Citibank") (A3). In connection with the loan guarantee financing, Teltronics granted Ericsson a security interest in all of its leases to customers (A3), agreed to purchase equipment from Ericsson in a dollar amount which far exceeded the amount of the loans, agreed that Ericsson could accelerate the loans if such purchases were not made and effectively gave up the right to purchase equipment from alternative sources (JA20-21).

The Allegations of the Second Complaint

Teltronics has alleged that in 1978, when it attempted to compete aggressively against Ericsson New England for telephone lease business throughout the northeast, Ericsson took retaliatory action to force Teltronics out of all but the metropolitan New York market and to take over Teltronics' business at minimal cost to itself (JA15-19). According to the second complaint, Ericsson first demanded that Teltronics withdraw from the New England market, then refused to deliver equipment to Teltronics for installation in New England, and then demanded that Teltronics accept Ericsson's terms for a takeover of its business at an unreasonably low price (JA14-23).

Teltronics has further alleged that on February 28, 1979, while it was negotiating with Erricson for relief from the

pressures which had been placed upon it, an interest payment of approximately $210,000 became due from Teltronics to Ericsson's affiliate Nordic, but that it was advised by Ericsson that such interest payment might be deferred during the continuance of the negotiations (JA23-27). A document of record in a related bankruptcy court proceeding confirms that Teltronics' representatives were in fact advised by Ericsson's representatives that the interest payment in question had been deferred until March 31, 1979.* Notwithstanding these assurances, on March 5, 1979, Ericsson seized upon the pretext of Teltronics' failure to make the Nordic interest payment. On that day, it caused Nordic to accelerate all of its outstanding loans to

*In a memorandum dated February 28, 1979, Ericsson's auditors (Price, Waterhouse & Co.) acknowledged having advised Teltronics' auditors that the interest due on that date had been deferred to March 31, 1979.

Teltronics, immediately paid Nordic the full amount of those loans, and then immediately moved to attach Teltronics' leases, the value of which far exceeded the amount of the loans (A3-4).

Teltronics has further alleged that it was never given the opportunity to regularize its relationship with Nordic by making the interest payment, although it was at the time financially able to do so. During the period from February 28 to March 5, 1979, Ericsson's attorneys secretly worked with Nordic's attorneys to set up the mechanics for a preemptive strike against Teltronics' assets. That strike took place on March 5 and 6, 1979. By notifying all of Teltronics' customers to make payment only to Ericsson, by issuing a press release charging that Teltronics had defaulted in its obligations, by blocking Teltronics access to funds in its own bank account, by notifying

Teltronics' creditors of the alleged default, and by other action calculated to render Teltronics economically helpless, Ericsson made it financially impossible for Teltronics to pursue effectively its remedies at law (JA144-5; 309; 312; 343; 381).

The result of these actions was to destroy Teltronics' entire business almost overnight and ultimately to cause its bankruptcy. We stress that these allegations have never been refuted on their merits.

The Earlier Complaint

On March 8, 1979, only three days after Ericsson had commenced what proved to be a successful effort to take over substantially all of Teltronics' business, assets and good will, Teltronics then attorneys filed a complaint in the United States District Court for the Southern

District of New York, in an action against LME, Ericsson and Nordic (A4). The complaint in that action contained four separately numbered "counts". The first and second counts alleged: that under unspecified federal and state "rules and regulations", LME and Ericsson were required to file notice of their intentions to acquire Teltronics' shares with the Securities and Exchange Commission; that such filings had not been made; and that Ericsson had neverless, with the assistance of Nordic, and through the use of the mails, pressured Teltronics to accept its take over proposal (A4, JA101-09). The third count alleged: that Ericsson had "consistently tried to compel Teltronics to discontinue and close its Boston office on the grounds that [LME and Ericsson] did not want the business competition of Teltronics; that Ericsson USA had cut off supplies to Teltronics and

threatened "to drive Teltronics out of the Boston area through various unnamed means and various other tactics"; and that this "violated Federal rules and regulations concerning trade and commerce in that they constituted a restraint of such trade and commerce" (JA109-11). The fourth count demanded reimbursement of Teltronics' legal fees (JA111).

Soon thereafter, Teltronics retained new counsel who moved for a preliminary injunction against allegedly threatened further violations of both the securities and antitrust laws (A4; JA237). Although the case had been assigned to Judge Whitman Knapp, the preliminary injunction motion was heard on March 28, 1979 by Judge Morris E. Lasker, since Judge Knapp was on vacation (A4). While the focus of Teltronics' presentation was upon Ericsson's alleged securities acts violations, Teltronics also submitted affidavits and

testimony by its president and the manager of its Boston office, setting forth the essential facts alleged in its current antitrust complaint (A19; JA239-43; 302-14; 322-26).

Judge Lasker found the evidence insufficient to establish any violation of the securities laws. He stated, however: "I am not talking about the possibility of proving any other violations" (JA246). He denied all requests for restraints against alleged securities acts violations. As to the requests for antitrust related restraints against solicitation of Teltronics' customers and employees and refusals to deliver needed equipment, he denied the motion without prejudice upon the agreement of Ericsson to deliver available equipment against payment by certified check and upon representations by Ericsson's counsel that Ericsson would

be advised against solicitation of Teltronics' customers and employees (JA244-47). He then stated:

> "To the extent that the application is denied, it is denied on all counts without prejudice to renewal in the event that any of the actions alleged here which I find so far not to have been established should seem to recur and plaintiff's counsel in good faith believes that they have competent, solid evidence that they are recurring." (JA246-47)

Immediately thereafter, Ericsson filed a motion to dismiss the initial complaint for failure to state a claim (JA250). That motion was heard by Judge Knapp on May 4, 1979 and again focused upon Teltronics' attempt to state a claim for violation of the securities laws (A4; JA282-93). In the preceding weeks, Ericsson had pre-empted all cash and credit sources which would otherwise have been available for the payment of Teltronics' legal expenses, and Teltronics opposed the motion to dismiss by the third of

the several hastily recruited attorneys to appear briefly for it in the matter (JA282). That attorney, in addition to being young and inexperienced, had not been involved in either the preparation of the complaint or the motion for injunctive relief and was evidently oblivious of all prior proceedings (A10; 19).

Because the affidavits and testimony received by Judge Lasker on the motion for injunctive relief were already of record, it would have required only that Judge Knapp be apprised of their existence in order to convert Ericsson's motion from one for judgment on the pleadings to one for summary judgment. See Fed.R.Civ.P. 12(b). If that had been done, the material issues of fact raised on the preliminary injunction hearing before Judge Lasker would have precluded dismissal of Teltronics' antitrust claim, irrespective of any facial inadequacies of its initial

complaint. See Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962). But Teltronics' new counsel did not refer in his argument to the earlier affidavits and testimony and made only brief mention of the antitrust claim (A19; JA286-89; 293).

On May 9, 1979, Judge Knapp dismissed all four counts of the initial complaint in a memorandum decision, stating:

> "Accepting as true all of plaintiff's factual allegations, we are unable to find any provision of the securities acts requiring a filing in the situation above described, or anything that would render defendants liable in damages for their pleaded actions." (A18)

A judgment dismissing the complaint was entered on May 16, 1979 (A4). No relief from that judgment was requested by Teltronics' then counsel, and no appeal was filed (A4). The Trustee believes that Teltronics' failure to further pursue its remedies was related to its lack of funds

as a result of Ericsson's takeover of its assets.

Shortly after Teltronics' time to appeal had expired, its president learned of the decision in Copy-Data Systems, Inc., v. Toshiba America, Inc., 75 Civ. 1368, 1979-1 Trade Cases 62,696 (S.D.N.Y. June 11, 1979) (A18). In that case, upon facts similar to those set forth in the affidavits earlier submitted to Judge Lasker, District Judge Richard Owen found a per se violation of Section 1 of the Sherman Act. Teltronics then disposed of substantially all its remaining assets to Telecomm Equipment Corporation, in order to raise funds to pursue its antitrust claim against Ericsson (A7-8). It retained the attorneys who had represented Copy-Data Systems, Inc. to prepare the present complaint, which was filed on August 27, 1979, less than six months after the acts which drove Teltronics out

of business, and about three months after the first complaint was dismissed for failure to state a claim (A18). The following month, on September 17, 1979, Ericsson joined with other creditors to file an involuntary bankruptcy petition against Teltronics; and on September 28, 1979, Teltronics submitted itself to the jurisdiction of the bankruptcy court by filing a petition for an arrangement under Chapter XI of the Bankruptcy Act (A7). On October 17, 1979, Ericsson filed its motion to dismiss the second complaint as res judicata. Ericsson had not yet answered the new complaint and based its motion entirely on the provisions of Fed. R.Civ.P. 12(b)6 and 41(b) (A5).

Judge Lasker's First Decision

Upon the argument of Ericsson's motion to dismiss the second complaint, Judge Lasker was advised, upon a full set

of papers, of the underlying facts and of all prior proceedings. He acknowledged that under the literal language of Fed.R. Civ.P. 41(b) the new complaint was barred by res judicata, but nevertheless refused, for reasons of equity and public policy, to deny Teltronics an opportunity for an actual determination on the merits (A17-19).

Following this decision by Judge Lasker, Ericsson answered Teltronics' new complaint and asserted counterclaims (JA34-65). On April 17, 1980, it sought reargument of Judge Lasker's original decision, because of the bankruptcy court's finding that the means by which Teltronics had raised the money to pursue its anti-trust claim required investigation as a possible fraudulent conveyance (A6-7). For that reason and others, the bankruptcy court had adjudicated Teltronics a bankrupt on April 30, 1980 and appointed the

Trustee, who qualified on May 20, 1980 (A7).

Judge Lasker's
Decision on Reargument

In his decision on reargument, Judge Lasker noted the bankruptcy court's findings that Teltronics had failed to file a complete list of creditors and schedules of its operations, had made false and misleading statements to its creditors and to the court, had abused the jurisdiction of the court, and may have been responsible for a fraudulent conveyance of its assets. Based upon these findings, he held that the balance of equities had shifted, warranting denial of equitable relief from res judicata (A15-16). Judgment dismissing the second complaint was accordingly entered on July 7, 1980, and the Trustee appealed.

The Argument of the Appeal

Shortly prior to the argument of the appeal on December 8, 1980, the Trustee was able to obtain from the Securities and Exchange Commission transcripts of testimony and copies of Swedish language documents which the Commission had obtained from Ericsson and Nordic in connection with an investigation into Teltronics' affairs. He appended these documents to an affidavit filed with the bankruptcy court on November 17, 1980. The Trustee believed that such documents lent substantial support to Teltronics' antitrust claim against Ericsson because they acknowledged Ericsson's intent to cause the termination of competition between Ericsson New England and Teltronics in the Boston area, acknowledged Ericsson's concern that Teltronics might escape from its control by making alternative arrangements with a competitive manufacturer, and

acknowledged that Ericsson's primary purpose in early 1979 was to take over Teltronics' business, rather than to recover a debt. Just as importantly, they provided documentary evidence that Teltronics' February 28, 1979 "default" on an interest payment to Nordic had in fact been fraudulently induced by Ericsson as a pretext for a pre-emptive legal strike. Finally, testimony by an officer of Nordic showed complicity between Ericsson and Nordic in the inducement of the default.

Upon the argument of the Trustee's appeal to the Second Circuit, the court was asked to take judicial notice of the newly disclosed documents in considering whether policy reasons militated against rigid application of res judicata. The Trustee argued that there was precedent for such judicial notice in Kalimian v. Liberty Mutual Fire Insurance Co., 300 F.2d 547 (2d Cir. 1962); Landy v. Federal

Deposit Insurance Corp., 486 F.2d 139 (3rd Cir. 1973), cert. den. 416 U.S. 960 (1974); and Bryant v. Carleson, 444 F.2d 353 (9th Cir. 1971), cert. den. 404 U.S. 967 (1971). The court declined to take such judicial notice, or to consider any aspect of the actual merits of Teltronics' antitrust claim.

REASONS FOR GRANTING THE WRIT

I

The writ should be granted because this Court has already decided to review the same question in Federated Department Stores, Inc. v. Moitie (No. 79-1517).

The courts of appeal have taken divergent views concerning the flexibility (if any) to be employed in cases where the judicial concerns for finality embodied in res judicata doctrine collide with the strong public policy to encourage the prosecution of actions affected with a public

interest. This is made particularly evident through a comparison of the decision by the Second Circuit in the instant case and the decision by the Ninth Circuit in Moitie v. Federated Dept Stores, Inc., 611 F.2d 1267 (9th Cir. 1980). Both Moitie and the instant case involve the interplay of Fed. R.Civ.P. 12(b)(6) and Fed.R.Civ.P. 41(b) in the context of a private antitrust action in which (a) an initial complaint was dismissed for failure to state a claim, (b) through an attorney's omission no appeal was taken, (c) a subsequent complaint, stating a valid claim, was filed shortly thereafter, and (d) the district court dismissed the second complaint as barred by the literal language of Fed.R.Civ.P. 41(b). In both cases, the plaintiff appealed, asserting that considerations of equity and public policy should allow the second complaint to stand. In Moitie, the Ninth Circuit

accepted that argument, but in Teltronics, the Second Circuit rejected it.

Certainly, we cannot know why this Court elected to review the decision in Moitie; and we recognize that upon review the holding in the circuit court might be reversed. Yet, if this Court should affirm Moitie, it may well establish legal principles inconsistent with those applied in the Second Circuit's decision in Teltronics. For this reason, we believe that the Court should hear the two cases together. We have concluded that unless we seek an expedited review at this time, the Trustee may find himself without a remedy even if it should develop that the Second Circuit was in error.

II

The decision of the Second Circuit is in conflict with a prior decision of this court

In Mercoid Corp. v. Mid-Continent Invest. Co., 320 U.S. 661, 669-70 (1944), this Court held that res judicata, even if applicable, should not be applied under circumstances where it might lend the Court's aid to a scheme in violation of the antitrust laws. Such circumstances were present in both Mercoid and in the instant case. We believe that the decision of the Ninth Circuit was consistent with Mercoid, but that the decision of the Second Circuit was not.

Neither of the circuit courts concerned has directly addressed the Mercoid holding in its decision. Circuit Judge Mulligan, writing for the Second Circuit, cited only one antitrust decision of this Court involving a defense of res judicata.

That decision was Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955), in which the prior dismissal was based on a fully negotiated settlement agreement. We submit that Lawlor provides no precedent for a holding that a serious antitrust violation may be allowed to go unpunished, without the equivalent of an actual determination of the merits, solely because of a pleading defect in the original presentation.

III

The case should be reviewed because the district court's original decision, although consistent with overriding public policy, was rejected by the Second Circuit

We have never disputed that under the literal language of Fed.R.Civ.P. 41(b), Judge Knapp's dismissal of all four counts of Teltronics' original complaint operated as an adjudication "on the merits". But

upon any fair evaluation of the record, it must be evident that no Court has ever in fact rejected the antitrust count after considering the testimony and affidavits of record which were actually presented in its support (JA239-43; 302-14; 322-26). The only time when the actual merits of Teltronics' antitrust claim were ever brought to the district court's attention was on the hearing of Teltronics' preliminary injunction motion on March 28, 1979. Judge Knapp, to whom the case was assigned, would have heard that motion but for the happenstance of his vacation (A4). Instead, it was heard by Judge Lasker, who after considering all of the papers in the case, evidently concluded that the proof could support an antitrust claim, but not one for securities acts violations (JA245-46).

When Judge Knapp returned and, on May 4, 1979, heard Ericsson's motion to

dismiss all four counts of the original complaint for failure to state a claim, the new attorney for the beleaguered Teltronics was unprepared even to refer the Court to this matter already of record. Understandably, Ericsson did not undertake to rectify the omission. Were it not for the fortuitous coincidence of the change in judges with the change in attorneys, the District Court could thus have been expected, at the least, to allow Teltronics to replead its meritorious antitrust claim.

These facts formed the principal basis for Judge Lasker's original refusal to dismiss the instant case as res judicata. He noted that, upon the record presented, injustice could well result if Ericsson were granted summary absolution from the antitrust claim, and therefore declined to apply res judicata doctrine mechanically. That decision was, we con-

tend, fully supported by the facts, and firmly grounded in both principle and precedent.

The judicial rule of res judicata "is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court". Heiser v. Woodruff, 327 U.S. 726, 733 (1946). While res judicata allows a litigant to have his claim fully heard and determined only once, it should not be so applied as to deprive him of that one opportunity. Refinements of res judicata doctrine yield to the "overriding public policy" that the opportunity to be heard shall be real, and not illusory. Menendez v. Saks & Co., 485 F.2d 1355, 1364 (2d Cir. 1973), rev'd on other grounds, 425 U.S. 682 (1976). This rule

of reason was emphasized by the Second Circuit itself in an opinion by Judge Friendly in La Societe Anonyme des Parfums le Galion v. Jean Patou, Inc., 495 F.2d 1265, 1276 (2d Cir. 1974):

> "Since the doctrine is intended to serve the aims of fairness and efficient judicial administration, it need not be applied mechanically where those ends would not be served. As we have noted on several occasions, res judicata principles, if applied inflexibly, can at times result in unwarranted hardship."

Judicial restraint in the application of res judicata principles is particularly exemplified by cases affected with a public interest. See Moitie v. Federated Dept. Stores, Inc., supra.; Moch v. East Baton Rouge Parish School Bd., 548 F.2d 594 (5th Cir. 1977), cert. den. 434 U.S. 859 (1977); Ornstein v. Regan, 574 F.2d 115 (2d Cir. 1978); Desrosiers v. American Cyanimid Co., 377 F.2d 864 (2d Cir. 1967).

Although some of these cases involved an intervening change in applicable law,

that consideration was not decisive. As the Fifth Circuit observed in Moch:

> "Generally, a postjudgment change of circumstances, either factual or legal, does not alter that judgment's effect as a bar to later actions based on the same cause of action. 1B Moore's Federal Practice, 0.415, at p. 2052-52 (2nd ed. 1974). Yet, courts have occasionally rejected strict application of bar and estoppel principles when their use would violate an overriding public policy or result in manifest injustice. E.g., Dore v. Kleppe, 522 F.2d 1369 (5th Cir. 1975) (res judicata is a principle of public policy and should be applied so as to give rather than deny justice); Schlegel Manufacturing Co. v. USM Corp., 525 F.2d 775 (6th Cir. 1975), cert. denied, 425 U.S. 912, 96 S.Ct. 1509, 47 L.Ed.2d 763 (1976); La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265 (2d Cir. 1974); Kinnear-Weed Corp. v. Humble Oil and Refining Co., 403 F.2d 43 (5th Cir. 1968) (en banc); Spiller v. Hankin, 88 U.S.App.D.C. 206, 188 F.2d 35 (1951). See generally 1B Moore's Federal Practice, 0.405[11]." 548 F.2d at 596-97 (footnote omitted).

The court held that since the plaintiff's claim was one affected by public policy, it would not apply res judicata, quoting from an earlier case:

> "Again, when as here private litigation has extensive implications of public import, the rule of res judicata or estoppel is not allowed to stultify reassessment of the prior decision. The public interest supersedes the private interest." id. at 598 (quoted from Griffin v. State Board of Education, 296 F. Supp. 1178, 1182 (E.D. Va. 1969)).

In its refusal to consider the actual merits of Teltronics' antitrust claim, the Second Circuit has retreated from its own earlier holdings and in effect held that the literal language of Fed.R.Civ.P. 41(b) expresses a public policy which is more important than the prevention of unfair competition. It has stated that even in an antitrust case, a plaintiff who has already showed that its claim is meritorious, may not be relieved from a dismissal of that claim, caused by the neglect of its attorney to take full note of the implications of a procedural Rule.

Whatever blame may be placed upon Teltronics for its former attorney's

neglect, the stark fact remains that under the judgment of the Second Circuit, the punishment has now been inflicted upon Teltronics' innocent creditors. the courts below have justified that result upon the ground that Teltronics acted improperly in other, subsequent and wholly unrelated matters. We do not believe that such a result can be reconciled with prior pronouncements of this Court.

It is not unusual for a defendant in a meritorious antitrust case to seek absolution by asserting that. the plaintiff is himself a scoundrel who deserved everything he got. All such attempts have been rejected as contrary to public policy. In Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968), Justice Black stated:

> "[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in

> violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct."

The principal antitrust cases relied upon by Circuit Judge Mulligan for his decision in this case are Robertson v. National Basketball Assoc., 622 F.2d 34 (2d Cir. 1980) and Kreager v. General Electric Co. 497 F.2d 468 (2d Cir. 1974), cert. den. 419 U.S. 861 (1974). While it is true that in each of those cases the bar of res judicata was upheld, neither is remotely comparable to Teltronics. Robertson involved an attempt by an athlete to reinstitute an antitrust claim

which had been fully resolved in 1976 by the court-approved settlement of an earlier antitrust class action. The earlier action had been commenced in 1970, and prior to the entry of the judgment confirming the settlement, 143 persons had been deposed, some 200,000 documents had been produced, and 45,000 pages of testimony had been received. Kreager involved an attempt by the principal stockholder of a corporation to reinstitute an antitrust action which had originally been brought in the name of the corporation and had been dismissed by Judge Weinfeld after the close of all the evidence. Neither case provides precedent for the nullification of an ostensibly valid antitrust claim without an actual determination on the merits or the practical equivalent.

We respectfully submit that the implications of the Second Circuit's holding in the instant case are far-reaching in

terms of antitrust enforcement. This case will be interpreted as a statement that antitrust violations may go unpunished, provided that the perpetrator does his work well enough to render his victim powerless to resist effectively.

CONCLUSION

For the reasons stated, Petitioner requests that his petition for a writ of certiorari be granted.

Dated: New York, New York
March 2, 1981

Respectfully submitted,

Gabriel B. Schwartz

David I. Blejwas

Attorneys for Petitioner, Jules J. Hessen, as Trustee in Bankruptcy of Teltronics Services, Inc.

APPENDIX

United States Court of Appeals

FOR THE

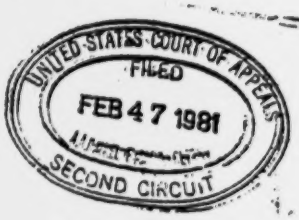
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of February one thousand nine hundred and eighty-one.

Present:

HON. J. EDWARD LUMBARD
HON. WILLIAM H. MULLIGAN
HON. ELLSWORTH A. VAN GRAAFEILAND,

Circuit Judges,



TELTRONICS SERVICES, INC.,

Plaintiff-Appellant,

v.

L. M. ERICSSON TELECOMMUNICATIONS, INC.,

Defendant-Appellee.

80-7586

80-7586

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

by Arthur Heller
Arthur Heller,
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 488—September Term, 1980

(Argued December 8, 1980 Decided February 17, 1981)

Docket No. 80-7586

TELTRONICS SERVICES, INC.,

Plaintiff-Appellant,

—against—

L. M. ERICSSON TELECOMMUNICATIONS, INC.,

Defendant-Appellee.

Before:

LUMBARD, MULLIGAN and VAN GRAAFEILAND,

Circuit Judges.

Appeal from order of dismissal of complaint on grounds of *res judicata* by Judge Morris E. Lasker, Southern District of New York. The order is affirmed.

GABRIEL B. SCHWARTZ, Baltimore, Maryland (Frank, Bernstein, Conaway & Goldman, Baltimore, Maryland, David I. Blejwas, Baltimore, Maryland, of counsel), *for Plaintiff-Appellant.*

RICHARD G. LYON, New York, New York (Sullivan & Cromwell, New York, New York, Richard R. Howe, Robert M. Osgood, Robinson B. Lacy, New York, New York, of counsel), *for Defendant-Appellee.*

HAHN, HESSEN, MARGOLIS & RYAN, New York, New York, *for Jules J. Hessen, Trustee in Bankruptcy.*

MULLIGAN, *Circuit Judge*:

L. M. Ericsson Telecommunications, Inc. (Ericsson) is a New York corporation and a wholly owned subsidiary of Telefonaktiebolaget L.M. Ericsson (LME), a Swedish manufacturer of telephone equipment. Teltronics Services, Inc. (Teltronics) is a New York corporation engaged in the business of selling, installing and servicing telephone equipment some of which was purchased from Ericsson. Since 1975 Ericsson provided financing to Teltronics by guaranteeing substantial bank loans to that company from Nordic American Banking Corporation (Nordic) and First National City Bank (Citibank) pursuant to a security agreement which included among its terms a provision that Teltronics would pledge to Ericsson certain rental agreements between Teltronics and its customers for rental of telephone systems. On February 28, 1979 Teltronics defaulted in an interest payment to Nordic, whereupon Nordic accelerated all of Teltronics' indebtedness. On the basis of this default Citibank declared Teltronics to be in default and also accelerated its indebtedness. Upon demand from the banks Ericsson paid the debt and brought actions in the state courts to recover the money from Teltronics. Ericsson also sought

to attack pledged collateral under the terms of the security agreement and notified Teltronics' lessees that rental payments were to be made to Ericsson.

On March 8, 1979 Teltronics filed its first complaint in the Southern District Court of New York against Ericsson, LME and Nordic in four counts. The first two counts alleged violations of the Securities Act of 1934, 15 U.S.C. § 78. The third and fourth counts alleged restraints of trade based upon alleged threats by defendants to cut off supplies and close down Teltronics' Boston operations. The jurisdictional basis urged upon the court in Paragraph Fifth(A) of the complaint included both the Sherman and Robinson-Patman Acts, 15 U.S.C. §§ 1, 2, 13, 13(a) and 15. Teltronics then moved before Judge Morris Lasker for a preliminary injunction which was denied after a hearing on March 28, 1979. No appeal was taken. The defendants then moved to dismiss the complaint for failure to state a claim upon which relief could be granted. After briefing and oral argument, Judge Whitman Knapp[1] dismissed the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). A judgment of dismissal was entered on May 16, 1979. No motion was made to amend the complaint and no appeal from the judgment which became final on June 15, 1979 was ever taken.

On August 27, 1979, Teltronics armed with new counsel filed a second complaint in the Southern District of New York again alleging violations of section 1 of the Sherman Act.[2] Ericsson was named as defendant but LME was

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1 The case had been originally assigned to Judge Knapp. The motion for a preliminary injunction, however, had been heard by Judge Lasker because Judge Knapp was on vacation.

2 The President of Teltronics had read a newspaper report of Judge Richard Owen's decision in *Copy-Data Systems, Inc. v. Toshiba*

named only as a co-conspirator. Again the complaint alleged that Ericsson was restraining competition, allocating territories and preventing Teltronics from competing in the Boston area. Teltronics sought damages in the amount of $40 million before trebling. On October 16, 1979 Ericsson moved pursuant to Rule 12(b)(6) to dismiss the second action as barred by *res judicata* by reason of the dismissal of the first action. By order dated March 28, 1980, reported at 486 F. Supp. 836, Judge Lasker denied the motion to dismiss. In his opinion Judge Lasker noted that Teltronics had admitted on oral argument that the cause of action alleged in the present complaint was "the same as that dismissed in the prior action." *Id.* at 837. While Teltronics' second action pleaded its antitrust contentions in greater detail, he found that Teltronics "had ample *opportunity* to present its antitrust claim in the earlier action." *Id.* at 837 (emphasis in original). Judge Knapp, the court noted, had specifically asked Teltronics' counsel during oral argument on the motion to dismiss, what facts supported the antitrust claim.[3] The court

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America, Inc., 75 Civ. No. 1368 (CCH) (1979-1 Trade Cas. ¶ 62,696) (S.D.N.Y. 1979) which held that certain conduct of Toshiba, Inc. constituted per se violations of the Sherman Act. Teltronics then retained the successful counsel in that case. The *Copy-Data* opinion was not, and did not purport to raise, novel legal precedent sufficient to overcome the *res judicata* effect of a prior judgment. See *Desrosiers v. American Cyanamid Co.*, 377 F.2d 864 (2d Cir. 1967).

3 Judge Knapp asked Teltronics' counsel to explain the theories underlying each of the four causes of action in the first complaint. Teltronics' counsel essentially repeated the factual allegations included in the securities claims even after Judge Knapp asked for further explication of the antitrust claims:

The Court: What other things have they done except sell on this note that you say constitutes an antitrust violation?

Mr. Taubman: I direct the court's attention to the first 40 points in the complaint, paragraphs in the complaint,

further found that since Judge Knapp's order was a dismissal on the merits, it was within Rule 41 Fed. R. Civ. P. and thus "technically bars this action." *Id.* at 838.[4]

Despite this finding the court denied the motion to dismiss by reason of equitable considerations including Judge Knapp's failure in his decision to discuss explicitly the merits of the purported antitrust claim and the failure of plaintiff's former counsel to refer to statements and testimony in support of the injunctive relief sought.

On April 17, 1980 Ericsson made a motion for reconsideration which the district court treated as a motion for reargument. In its moving papers Ericsson argued that Judge Knapp's dismissal for failure to state a claim operated as a judgment on the merits which barred the

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and in paragraph 40 itself it enumerates that we are repleading the first 40. We can go right down the list.

The Court: I see. Just the things that you have already said.

Mr. Taubman: That's correct, your Honor.

4 Rule 41(b) Fed. R. Civ. P. provides:

. . .

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

second action under Rule 41, and that Judge Lasker erred by requiring the movants to offer affirmative evidence to show that the dismissal was intended to be with prejudice.[5] Judge Lasker granted the motion for reargument and dismissed the complaint because subsequent events created serious doubts of Teltronics' good faith sufficient to invoke the equitable considerations accounted for in denying the motion to dismiss on *res judicata* grounds.

On September 18, 1979 Ericsson and three other creditors had filed an involuntary petition in bankruptcy in the Eastern District of New York requesting that Teltronics be declared a bankrupt. In response Teltronics filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. In an opinion dated April 30, 1980 Bankruptcy Judge Goetz dismissed the Chapter XI proceeding and adjudicated Teltronics a bankrupt. Jules J. Hessen qualified as Trustee for the bankrupt on May 20, 1980. The Bankruptcy Judge found that Teltronics had failed to file a complete list of creditors and schedules of its operations, assets, liabilities and executory contracts, had made false and misleading statements to its creditors and the courts, had abused the jurisdiction of the court and had entered into a transaction with Telecom Equipment Corporation whereby in the words of the Bankruptcy Judge, "Teltronics disposed of all, or virtually all, of

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5 In his memorandum decision on Ericsson's motion for reconsideration or certification for appeal pursuant to 28 U.S.C. § 1292(b), Judge Lasker recognized the "substantial ground for difference of opinion" as to his initial interpretation of Rule 41(b) which place a burden on the movants to show that the previous dismissal under Rule 12(b)(6) "was intended to be with prejudice." 486 F.Supp. at 838. Although he did not address the merits of this issue, we note that the literal language of Rule 41(b) creates no such burden. See *Weston Funding Corp. v. Lafayette Towers*, 550 F.2d 710, 713 (2d Cir. 1977); *Exchange National Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1131 (2d Cir. 1976).

what assets remained to it in order to pursue its antitrust claims against Ericsson." She found that this transaction required an investigation to determine whether there was in fact a fraudulent conveyance. For these reasons Judge Lasker found that the balance of equities were tipped in favor of Ericsson and warranted dismissal of the second complaint. Judgment was entered on July 7 and the Trustee noticed this appeal on July 19. The Trustee then moved to substitute himself for Teltronics as the plaintiff-appellant. The motion was consolidated with this appeal. On the argument of this appeal the motion of the Trustee for substitution was granted for the limited purpose of this appeal without prejudice to any counterclaims by Ericsson against Teltronics which may still be pending in the District Court. That presents an issue for the District Court to determine. The order dismissing the complaint is affirmed.

I.

We note at the outset that the Trustee does not dispute that under the literal language of Fed. R. Civ. P. 41(b), Judge Knapp's dismissal of all four counts of Teltronics' original complaint operated as an adjudication on the merits. Nonetheless the appellant urges that Teltronics should be relieved from the application of the doctrine of *res judicata*. None of the reasons advanced, however, are persuasive.

This court has held that "judgments under Rule 12(b)(6) are on the merits, with *res judicata* effects . . . ." *Exchange National Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2d Cir. 1976) (emphasis in original). This rule is in accord with the literal language of Fed. R. Civ. P. 41(b). Judge Knapp's

memorandum and order of May 9, 1979 clearly granted defendant's motion under Rule 12(b)(6). Although the order does not refer specifically to the Sherman Act it does recite Teltronics' claim that Ericsson had slowed down or stopped shipments of equipment and "[t]hrough these and various unnamed means and various other tactics (Complaint Para. 45) [the third count], defendants also sought to eliminate Teltronics as a competitor of the Ericsson defendants in the Boston area. Accepting as true all of plainitff's factual allegations, we are unable to find any provision of the securities acts requiring a filing in the situation above described, or anything that would render defendants liable in damages for their pleaded actions."

While Judge Knapp's order did not cite the Sherman Act or indicate the exact basis of the antitrust claims, it is clear that he dismissed all of the counts and made specific reference to the claim that Ericsson had sought to remove Teltronics as a competitor in the Boston area. This court has emphasized that a final judgment is *res judicata* "not only to all matters pleaded, but to all that might have been" and "not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit." *In re Interstate Stores,* 558 F.2d 1046, 1047 (2d Cir. 1977) (quoting *Heiser v. Woodruff,* 327 U.S. 726, 735 (1946)); see *Herendeen v. Champion International Corp.,* 525 F.2d 130, 133 (2d Cir. 1975).[6]

In this case the same parties, the same cause of action and the same facts form the basis of the second complaint. It was therefore barred by *res judicata* principles.

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6 While the second complaint is more detailed and generally drafted in a more sophisticated fashion than the first complaint it does not add any new factual material which transpired after the dismissal of the first complaint.

Appellant seeks to avoid this principle on the theory that its counsel was inexperienced and that the complaint was hastily prepared. This provides no basis for relief here. In *Lambert v. Conrad,* 536 F.2d 1183, 1186 (7th Cir. 1976) a similar argument was made to avoid the *res judicata* doctrine. In rejecting the claim, the court stated:

> During the interval plaintiff made no effort to amend his complaint to change the defendants or to seek damages. While the initial complaint seeking injunctive relief might have been hastily drafted, plaintiff had ample time to amend his complaint to seek more comprehensive relief; instead he allowed the action to be dismissed. After judgment was entered, plaintiff could have appealed on the grounds that the district court erred by dismissing on the merits rather than for want of jurisdiction, but he did not. There is no unfairness in not allowing the plaintiff collaterally to attack the prior judgment.

In this case the plaintiff made no attempt to amend the complaint, to appeal, or to seek relief under Rule 60(b) Fed. R. Civ. P.[7] This court has also taken a dim view of a

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7 In pertinent part, Fed. R. Civ. P. 60(b) provides:

Rule 60. Relief from Judgment or Order

. . . .

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any

plaintiff's efforts to avoid *res judicata* effects of a prior judgment of dismissal on the ground that it did not adequately present the case initially. See *Schmeider v. Hall,* 545 F.2d 768 (2d Cir. 1976), cert. denied, 430 U.S. 955 (1977).

The concerns for judicial economy that require that the whole controversy should be brought in the same court in the same controversy so that unnecessary litigation be avoided and matters be judicially concluded, has similarly motivated this court in Rule 60(b) cases. In *United States v. Cirami,* 535 F.2d 736 (2d Cir. 1976) appellants sought relief from a summary judgment imposing a tax deficiency on the ground of attorney ineffectiveness and neglect. In that opinion we noted the rather consistent refusal of the Second Circuit "to relieve a client of the burdens of a final judgment entered against him due to the mistake or omission of his attorney by reason of the latter's ignorance of the law or rules of the court, or his inability to efficiently manage his caseload." 535 F.2d at 740.

While it is true that *res judicata* is not to be mechanically applied, *La Societe Anonyme des Parfums le Galion v. Jean Patou, Inc.,* 495 F.2d 1265, 1276 (2d Cir. 1974), no case has been cited or discovered where relief from *res judicata* principles has been granted simply because the plaintiff was represented by inexperienced counsel. To sanction this exception would be to encourage endless litigation and the relitigation of issues previously determined thus emasculating the very basis of the doctrine.[8]

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other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

8 "Res judicata is a salutary doctrine, judicial in origin, that reflects 'considerations of economy of judicial time and public policy favoring

In our jurisprudence "each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts . . . ." *Link v. Wabash,* 370 U.S. 626, 633-34 (1962) (quoting *Smith v. Ayer,* 101 U.S. 320, 326 (1879)).

II.

Appellant further argues that strong public policy favoring the adjudication of antitrust claims on the merits and the bankruptcy law's emphasis on equitable distribution of the estate, outweigh judicial concerns for finality of decision embodied in the *res judicata* doctrine. Although there is undoubtedly an interest in the enforcement of the antitrust laws, there is no authority whatever to support the contention that this policy excuses the failure of a private plaintiff in an antitrust case to plead and prove its case when brought. On the contrary, the case principally relied upon by the appellant indicates the opposite result. In *Lawlor v. National Screen Service Corp.,* 349 U.S. 322 (1955) a prior antitrust action between the parties resulted in a dismissal in 1943 on the basis of a 1942 settlement. A second action was commenced in 1949 but it alleged conduct arising subsequent to the dismissal of the first complaint. Since *res judicata*

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the establishment of certainty in legal relations.' " *Mitchell v. National Broadcasting Co.,* 553 F.2d 265, 268 (2d Cir. 1977) (quoting *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591, 597 (1948)). The Supreme Court described the general purpose of the rule: "Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be involved for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect to all matters properly put in issue and actually determined by them." *Southern Pacific R.R. Co. v. United States,* 168 U.S. 1, 48-49 (1897).

principles do not apply to conduct which could not have been the basis for the 1943 dismissal, the court stated:

> The conduct presently complained of was all subsequent to the 1943 judgment. In addition, there are new antitrust violations alleged here—deliberately slow deliveries and tie-in sales, among others—not present in the former action. *While the 1943 judgment precludes recovery on claims arising prior to its entry,* it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case. *Id.* at 328 (emphasis added; footnotes omitted).

As we have indicated there is no conduct alleged in the second complaint in this case which arose after Judge Knapp's first dismissal. While the second complaint is in greater detail, it is based upon the same conduct alleged in the first complaint. That dismissal therefore, in the language of *Lawlor,* precludes a recovery on claims arising prior to its entry. See *Robertson v. National Basketball Ass'n,* 622 F.2d 34 (2d Cir. 1980); *Kreager v. General Electric Co.,* 497 F.2d 468 (2d Cir. 1974), cert. denied, 419 U.S. 861 (1974); *Neeld v. National Hockey League,* 439 F. Supp. 446 (W.D.N.Y. 1977) (cases barring relitigation of antitrust actions on grounds of *res judicata*).

The fact that Teltronics is now bankrupt does not liberate the trustee from the *res judicata* effects of the dismissal of the antitrust claims on the merits. While the trustee is a representative of creditors and is empowered to avoid fraudulent transfers there is nothing to suggest that Ericsson was guilty of any fraud or misconduct in seeking dismissal of the complaint. On the contrary, one suggestion of misconduct found by the bankruptcy court was in Teltronics' conveyance of assets to Telecom which

resulted in a $50,000 cash payment found by the bankruptcy judge to have been used to pay legal fees to Teltronics' new counsel in filing the second antitrust complaint against Ericsson. Hence we see no reason to depart from the general rule that a judgment rendered against a bankrupt prior to his bankruptcy is conclusive upon the trustee. 1B J. Moore, Federal Practice ¶ 0.419(3.-6) at 3124-25 (2d ed. 1965).

In sum we find no equitable basis to support Judge Lasker's initial opinion finding *res judicata* principles not applicable.

cate for appeal of the denial of that motion and the briefs submitted to the Appellate Division, it appears that the issue whether the denial of his motion to set aside the verdict violated McIntosh's federal constitutional rights has not been presented to the New York courts. Since McIntosh's state remedies have not been exhausted on this claim, this court has no jurisdiction to decide its merits.[6] 28 U.S.C. § 2254(b), (c). *See Cameron v. Fastoff*, 543 F.2d 971, 977 (2d Cir. 1976).

Accordingly, the petition for a writ of habeas corpus is denied.

It is so ordered.

TELTRONICS SERVICES, INC., Plaintiff,

v.

L M ERICSSON TELECOMMUNICATIONS, INC., Defendant.

No. 79–4513.

United States District Court, S. D. New York.

June 16, 1980.

Following an order, 486 F.Supp. 836, refusing to dismiss a securities and antitrust action, defendant moved for reconsideration, or alternatively for certification for appeal. The District Court, Lasker, J., held that where the district court had initially exercised its equitable discretion and declined to apply res judicata to the suit, but subsequently a bankruptcy court found that plaintiff had not been acting in good faith in related bankruptcy proceedings, the plaintiff had not followed the course of conduct required to entitle it to invoke the equitable power of the court to decline to apply res judicata.

Motion granted and complaint dismissed.

Judgment ⇐542

Where district court had initially exercised its equitable discretion and declined to apply res judicata to securities and antitrust suit, but subsequently bankruptcy court found that plaintiff had been acting in bad faith in related bankruptcy proceedings, plaintiff had not followed course of conduct required to entitle it to invoke equitable power of court to decline to apply res judicata and res judicata would be applied to bar suit.

Frank, Bernstein, Conaway & Goldman, Robert G. Levy, Berryl A. Speert, Allan P. Hillman, Jacob Silverman, Baltimore, Md., for plaintiff; Lorenz, Finn, Giardino & Lambos, New York City, of counsel.

Sullivan & Cromwell, New York City, for defendant; Robert M. Osgood, Richard G. Lyon, Robinson B. Lacy, New York City, of counsel.

LASKER, District Judge.

L M Ericsson Telecommunications, Inc. (Ericsson) moves for "reconsideration," or alternatively for certification for appeal pursuant to 28 U.S.C. § 1292(b) of an order dated March 28, 1980, reported at 486 F.Supp. 836, denying its motion to dismiss the complaint as barred by res judicata. In that opinion, although the dismissal of an earlier complaint brought by Teltronics Services Inc. (Teltronics) against Ericsson, its subsidiary, its parent, and Nordic American Banking Corporation alleging securities and antitrust law violations was held to be "on the merits" within Rule 41 of the Fed-

6. The fact that one claim has not been exhausted does not deprive the court of jurisdiction over the remaining exhausted claims. *Cameron v. Fastoff*, 543 F.2d 971, 976 (2d Cir. 1976); *Mercado v. Rockefeller*, 502 F.2d 666, 668 n.1 (2d Cir. 1974), *cert. denied*, 420 U.S. 925, 95 S.Ct. 1120, 43 L.Ed.2d 394 (1975); *United States ex rel. Levy v. McMann*, 394 F.2d 402, 404–05 (2d Cir. 1968); *Comment*, 52 N.Y.U.L. Rev. 1428 (1977).

eral Rules of Civil Procedure, and consequently technically applied to bar the present action, the circumstances of this case were held to warrant the exercise of the equitable power of the court to decline mechanically to apply res judicata to bar this action.

In support of its motion for "reconsideration" which will be treated as one for reargument, see United States District Courts for the Southern District of New York General Rule 9(m), Ericsson argues, as it did on the earlier motion, that the "express language" of Rule 41 mandates dismissal of this action. However, the motion was not denied because the language of Rule 41 was inapplicable, but because of the equitable considerations noted.

Ericsson now presents the additional argument that the recent decision in *In re Teltronics Services, Inc.*, No. 79B2725 (E.D. N.Y. April 30, 1980), in which the bankruptcy judge dismissed Teltronics' Chapter XI proceeding and adjudicated it bankrupt, is relevant to the decision on the motion to dismiss in the case at hand. One of the reasons for earlier refusing to dismiss the complaint was the apparent good faith of Teltronics. Among the findings of the bankruptcy court, however, were that Teltronics had failed to file a complete list of creditors and schedules of its operations, assets, liabilities and executory contracts, in violation of the bankruptcy rules and specific oral directives from the court, made false or misleading statements to its creditors and the court, entered a transaction which required an investigation as to whether it was a fraudulent conveyance, and abused the jurisdiction of the court.

Although it is true, as Teltronics argues, that nothing in the opinion indicates Teltronics' lack of good faith in filing the instant antitrust action, nevertheless, these findings create serious doubt as to whether Teltronics has followed that course of conduct required to entitle it to invoke the equitable power of the court to decline to apply res judicata to this suit.

Moreover, Ericsson asserts in support of its alternative motion for section 1292(b) certification, that there is substantial ground for difference of opinion as to the validity of the earlier opinion. We accept that view and Teltronics does not dispute it. Consequently, a *clear* showing of Teltronics' good faith is necessary to tip the balance in its favor, and the findings of the bankruptcy judge refute such a showing.

It is appropriate to note that a decision in Teltronics' favor could well result in a long trial which upon appeal might be found to have been improvidently permitted. On the other hand, adhering to the normal rules of res judicata, as we now do, if determined on appeal to be incorrect, will enable further proceedings to occur without a cloud.

The motion to reargue is granted and the complaint dismissed.

It is so ordered.

The WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), Plaintiff,

v.

PATRIARCH STEAMSHIP COMPANY and Newton Waltham Bank and Trust Company, Defendants.

The WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED, Plaintiff,

v.

PATRIARCH STEAMSHIP COMPANY and Newton Waltham Bank and Trust Company, Defendants.

Civ. A. Nos. 71-1019-G, 71-1020-G.

United States District Court, D. Massachusetts.

June 17, 1980.

Action was instituted with respect to competing claims to funds of vessel in es-

TELTRONICS SERVICE, INC., Plaintiff,

v.

L M ERICSSON TELECOMMUNICATIONS, INC., Defendant.

No. 79 Civ. 4513.

United States District Court, S. D. New York.

March 28, 1980.

Plaintiff brought an action alleging defendant had violated Sherman Act and defendant moved to dismiss complaint on grounds that action was barred by res judicata. The District Court, Lasker, J., ruling on defendant's motion to dismiss held that although plaintiff had ample opportunity to present its antitrust claim in its earlier action, which it admitted involved same cause of action as instant case, where district court judge's decision to dismiss antitrust claim was best understood as holding only that plaintiff had not alleged facts necessary to state cause of action under antitrust laws, and not that plaintiff was incapable of stating such a claim, and where plaintiff's good faith was evident, instant case was not barred by res judicata.

Denied.

1. Judgment ⇐540

Generally, res judicata bars relitigation of same cause of action brought in prior action between the same parties, or their privies, in which a final judgment on the merits has been rendered.

2. Judgment ⇐570(5)

Dismissal for failure to state a claim operates as judgment on merits within literal language of applicable Federal Rule of Civil Procedure. Fed.Rules Civ.Proc. Rules 41, 41(b), 28 U.S.C.A.

3. Judgment ⇐570(11)

Although plaintiff had ample opportunity to present its antitrust claim in its earlier action, which it admitted involved same cause of action as instant case, where district court judge's decision to dismiss antitrust claim was best understood as holding only that plaintiff had not alleged facts necessary to state cause of action under antitrust laws, and not that plaintiff was incapable of stating such a claim, and where plaintiff's good faith was evident, instant case was not barred by res judicata.

Frank, Bernstein, Conaway & Goldman, Baltimore, Md., for plaintiff; Lorenz, Finn, Giardino & Lambos, New York City, of counsel.

Sullivan & Cromwell, New York City, for defendant; Richard R. Howe, Richard G. Lyon, Paul P. Colborn, Robinson B. Lacy, New York City, of counsel.

LASKER, District Judge.

L M Ericsson Telecommunications, Inc. (Ericsson) moves under Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint on the grounds that this action is barred by res judicata.

I. The Prior Action

In a prior action, Teltronics Services, Inc. (Teltronics) sued Ericsson, its subsidiary, its parent and Nordic American Banking Corporation (Nordic), alleging that Ericsson's offer to buy 30% of Teltronics stock without filing notice of that offer with the Securities and Exchange Commission violated federal securities laws. After Teltronics' refusal of that offer, defendants allegedly engaged in conduct in violation of the antitrust laws, intended to coerce Teltronics to accept the illegal offer and to eliminate the competition to Ericsson's New England subsidiary that was presented by Teltronics' Boston office. That conduct allegedly included causing Nordic to declare in default loans it made to Teltronics, slowing and stopping of shipments of telephonic equipment which Ericsson supplies to Teltronics and "various unnamed means and other tactics."

Judge Whitman Knapp granted defendants' motion to dismiss the complaint for failure to state a claim:

"Accepting as true all of plaintiff's factual allegations, we are unable to find any provision of the securities acts requiring a filing in the situation above described, or anything that would render defendants liable in damages for their pleaded actions."

Teltronics Services, Inc. v. L. M. Ericsson Telephone Co., 79 Civ. 1233, Slip op. at 2 (May 9, 1979).

II. The Present Complaint

After the time for appeal of Judge Knapp's decision expired, Teltronics' president, Edward Beagan, learned of a decision of this court in which Judge Owen found to violate Section 1 of the Sherman Act conduct Beagan believed to be similar to that of Ericsson alleged here. *Copy-Data Systems, Inc. v. Toshiba America, Inc.*, 75 Civ. 1368 (S.D.N.Y. June 11, 1979). He forthwith contacted counsel for the prevailing party in that case who were unable to meet with him until after concluding a trial then in progress. On August 27, 1979, Teltronics filed this action, alleging violation of Section 1 of the Sherman Act. In much greater detail than the earlier complaint, Teltronics claims that Ericsson attempted to eliminate the competition presented by Teltronics' Boston office to Ericsson's New England subsidiary. Teltronics alleges that the means used included threats to Teltronics to cause it to cease its competition with Ericsson's subsidiary in Boston, withholding shipments and "support letters" from Teltronics, causing the acceleration of loans owed by Teltronics, and soliciting Teltronics creditors to force it into bankruptcy.

III. Res Judicata

[1] Generally, res judicata bars the relitigation of the same cause of action brought in a prior action between the same parties (or their privies) in which a final judgment on the merits had been rendered. *Herendeen v. Champion International Corporation*, 525 F.2d 130, 133 (2d Cir. 1975).

Teltronics admitted during oral argument that the cause of action alleged here is the same as that dismissed in the prior action. In support of its contention that res judicata does not attach to the earlier action, Teltronics argues that if a party had not had an opportunity to litigate his claim in the prior action, he is not automatically barred from presenting the claim in a later suit, citing *Menendez v. Saks and Company*, 485 F.2d 1355, 1364 (2d Cir. 1973), *rev'd on other grounds sub nom., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); *Freeman v. Marine Midland Bank—New York*, 419 F.Supp. 440 (E.D.N.Y.1976), and that since the first complaint alleged nearly exclusively securities law claims and only a brief, general antitrust claim, "Teltronics did not have the opportunity to fully litigate this antitrust claim in the first action." Memorandum in Opposition to Defendant's Motion to Dismiss, p. 55. However, it is clear that Teltronics had ample *opportunity* to present its antitrust claim in the earlier action. The question was addressed in the briefs of both sides submitted on the motion to dismiss, and, as Teltronics acknowledges in its memorandum on this motion (p. 10), Judge Knapp specifically asked Teltronics' counsel during oral argument on the motion to dismiss (transcript p. 8) what facts supported the antitrust claim. Whether Teltronics took full advantage of the opportunity, however, is another question.

[2] The determinative issue here is whether Judge Knapp's order dismissed the antitrust claim "on its merits" for res judicata purposes. Federal Rule of Civil Procedure 41(b) provides:

"Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits."

Since the dismissal for failure to state a claim is neither a dismissal provided for by Rule 41 nor one of the exceptions listed, it operates as a judgment on the merits with-

in the literal language of the rule and technically bars this action.

[3] Nevertheless, it does not appear that this was necessarily the intended result of the dismissal of the antitrust claim in the first action. Judge Knapp was never apprised of the facts supporting Teltronics' antitrust claim. Its former counsel who represented it on the earlier motion failed to draw upon facts already established in affidavits and testimony elicited during a hearing on a motion for a preliminary injunction when asked what facts supported the antitrust cause of action. Judge Knapp's brief memorandum granting the motion to dismiss does not refer explicitly to the antitrust claim nor discuss its merits. His decision to dismiss the antitrust claim is consequently best understood as holding only that Teltronics had not alleged facts necessary to state a cause of action under the antitrust laws, and not that Teltronics was incapable of stating such a claim, and there is no reason to believe that upon request he would not have granted permission to replead the complaint. Furthermore, Teltronics' good faith is evident from its promptness in bringing this action after learning of Judge Owen's decision referred to above. Under these circumstances, without affirmative evidence showing that the dismissal was intended to be with prejudice, the order ought not to preclude a presentation of the claim on its merits.

Accordingly, the motion to dismiss is denied.

It is so ordered.